Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Competitive Broadband Access	)	GN Docket No. 17-142
To Multiple Tenant Environments	)	

REPLY COMMENTS OF

THE CITIES OF BOSTON, MASSACHUSETTS AND PORTLAND, OREGON, AND ANNE ARUNDEL AND MONTGOMERY COUNTIES, MARYLAND

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EXECUTIVE SUMMARY

If the Commission's goal is to improve competitive broadband access in Multiple Tenant Environments ("MTEs"), then preserving local laws that promote competitive broadband access in MTEs is a good start. Guaranteeing providers monopoly environments, even if for a better business case, is fundamentally at odds with the underlying purpose of the Telecommunications Act of 1996 and the purpose the Federal Communications Commission was created.

Local governments have a clear and compelling interest in promoting broadband availability, affordability, and competition in their communities, and undertake an array of pro-competitive, pro-consumer efforts to ensure that all the promise of the 21st century economy may be realized by their citizens. These efforts, and the authority and importance of state and local action to promote MTE competition, have historically been recognized, applauded, and protected by the Commission, and nothing in the record or in the marketplace supports any change in this position.

The Cities of Boston, Massachusetts and Portland, Oregon, joined by Anne Arundel and Montgomery Counties, Maryland ("Coalition") submit these Reply Comments in response to the Federal Communications Commission's ("Commission") Notice of Inquiry ("NOI") to address serious concerns raised by both the Commission's approach to the issue of broadband competition in MTEs and the record developed in response to the Commission's Notice of Inquiry. Any attempt to reverse decades of Commission practice in this area will certainly backfire, harming competition and leaving communities powerless to address anti-competitive practices and their inherently local impact.

Despite some industry allegations of harm arising from local government action, the record reflects that there is not a single substantive example of actual harm to deployment arising from local government policies. The record does demonstrate that landlord demands and

aggressive behavior by incumbent providers are the primary roadblocks to increased competition and deployment in MTEs. The voices attacking local government seek to preserve *de facto* exclusivity arrangements, not promote consumer choice. Furthermore, the Commission lacks authority to preempt the local government-landlord relationship. Section 253 provides limited, targeted preemption authority regarding rights-of-way, not landlord-tenant relationships, and is not applicable through general rulemaking. Additionally, the Commission cannot use Section 253 to insert itself into the inherently local, relationship between local governments and property owners in their communities. The record does not support any Commission action against local governments, owing to its total lack of substantive, specific evidence of any competitive harm arising from local government actions, let alone any harm rising to the level necessary to justify Section 253 action.

Furthermore, the Commission's outstanding proposal to abandon Title II classification of broadband as a telecommunications service would, if adopted, eliminate the Commission's ability to utilize Section 253 to advance its broadband policy goals.

Finally, the Coalition repeats its prior calls for the Commission to include additional local voices in the Broadband Deployment Advisory Committee. As the Commission seeks to develop model codes and compile best practices to help local governments address broadband issues, the Commission must consider not only those policy proposals acceptable to the broadband industry, but instead look at the full scope of practices, policies, and laws which local communities have pursued to ensure that 21st century connectivity demand can be met in communities nationwide.

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I. INTRODUCTION

The cities of Boston, Massachusetts and Portland, Oregon, joined by Anne Arundel and Montgomery Counties, Maryland ("Coalition") submit these Reply Comments in response to the Notice of Inquiry[1] ("NOI") and initial comments[2] filed in the above-captioned proceeding.

The Coalition's simple message is that, if the Commission's goal is to improve competitive broadband access in Multiple Tenant Environments ("MTEs"), then preserving state and local laws that promote competitive broadband access in MTEs is a good start. Guaranteeing monopolies for the business convenience of providers is fundamentally at odds with the underlying purpose of the Telecommunications Act of 1996 and the Federal Communications Commission itself.

As discussed in greater detail below, the record is barren of local government harms to broadband deployment and competition. Local governments have a significant interest in promoting broadband deployment and competitive entry, and the Federal Communications Commission ("Commission") has historically empowered and supported local efforts to promote consumer choice and competitive growth in Multiple Tenant Environments ("MTEs").[3] If any action is warranted in this proceeding, it should be to focus on incumbent provider and property owners' efforts to limit competitive entry. Finally, the Coalition notes that it would be sadly ironic for the Commission to preempt local laws fostering choice for the benefit of the same

[1] In the Matter of Improving Competitive Broadband Access in Multiple Tenant Environments, GN Docket No. 17-142, Notice of Inquiry (rel. Jun. 23, 2017) ("NOI").
[2] Unless otherwise specified, all Comments cited below are presumed filed in GN Docket No. 17-142.
[3] *See, e.g. In the Matter of Telecommunications Services Inside Wiring,* Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997) ("1997 Inside Wiring Order"); *In the Matter of Telecommunications Services Inside Wiring,* First Order on Reconsideration and Second Report and Order, FCC 03-9, 18 FCC Rcd. 1342 (2003) ("2003 Inside Wiring Order").

dominant providers and property owners whose conduct has compelled all past Commission action in this area.

II. LOCAL GOVERNMENTS RECOGNIZE AND HAVE A VESTED INTEREST IN ENSURING THE AVAILABILITY OF COMPETITIVE BROADBAND THROUGHOUT THEIR COMMUNITIES

The Commission's National Broadband Plan, released in 2010, notes in its introduction that "[b]roadband is a platform to create today's high-performance America - an America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy, an America with world-leading, broadband-enabled health care, education, energy, job training, civic engagement, government performance and public safety."[4] Local governments have a deep-seated interest in ensuring that this vision is realized, and for the past two decades have pursued universal broadband connectivity in their communities as perhaps the most critical factor in unlocking the potential of the digital economy. Local governments, such as Coalition members, understand connectivity can create jobs, drive education and civic engagement, enhance health, promote economic growth, and spur innovation. Local governments dedicated to advancing the interests of their constituents and promoting their communities in a competitive and connected world have long recognized the critical importance of broadband. One critical element in enabling communities to compete in a digital world remains ensuring that residents, governments, and businesses have access to competitive, high-speed broadband whether they occupy a single-occupant structure or share space in a MTE. State and local governments have long acted to promote competition in those environments. Commission precedent reflects a history of respect and praise for the efforts of local governments in the pursuit of enhanced competition, and interference with the ongoing efforts of local governments to promote

[4] Connecting America: The National Broadband Plan at p. 3 (2010).

broadband deployment and competition will cause far more harm to consumers and local businesses than any benefits that might accrue.[5]

While progress is being made, the vision of a robust competitive nationwide marketplace for telecommunications services, envisioned by Congress as it crafted the Telecommunications Act of 1996, remains unrealized.[6] Increasing consolidation in the ISP industry has also limited MTE competition, particularly in urban areas.[7] Approximately 30% of Americans reside in MTEs,[8] and property owners hold primary control over the degree of communications choice residents may have. Issues with MTE competition will only get worse, as MTE residency is on the rise.[9] Moreover, MTEs represent a higher share of urban markets, and the record reveals that competition in MTEs is largely dependent on small ISPs.[10] There is little direct competition between the country's four largest broadband providers. Approximately 61% of Americans, according to FCC data, have only one broadband provider providing service.[11] Even in the

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[5] 2003 Inside Wiring Order at p. 1358, ¶ 39.
[6] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, 2016 Broadband Progress Report (rel. Jan. 29, 2016) ("Broadband Progress Report") Table 6 (noting that 61% of Americans have at most one choice for fixed advanced telecommunications capability).
[7] Institute of Local Self Reliance and Next Century Cities ("ILSR/NCC") Comments at p. 3 (Jul. 25, 2017).
[8] See Table from the U.S. Census Bureau's 2010-2014 American Community Survey 5-Year Estimates, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B25024&prodType-table ("American Community Survey") (showing that thirty percent of American homes are in multifamily buildings).
[9] *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, 22 FCC Rcd 20235, ¶ 1 (Oct. 31. 2007) ("2007 Exclusivity Order").
[10] ILSR/NCC at p. 3.
[11] Broadband Progress Report at Table 6.

thirteen percent of census blocks which have three or more providers available,[12] "anecdotal evidence suggests that those living in MTEs within those census blocks likely do not have as many options."[13] Recent polling shows that seventy-five percent of Americans believe that "everyone needs [Internet access] in a 21st century economy," and that that same percentage of Americans believe "local government should play a role" in making sure Internet access is affordable and accessible.[14]

A. The Commission Has Long Recognized And Protected Local Governments' Authority To Act To Ensure Access And Promote Competitive Service To Multiple Tenant Environments

Over the past four decades, state and local governments have repeatedly acted to ensure that citizens have access to competitive communications options. Though originally enacted with the intent of promoting cable competition, the growth of broadband has given new importance to state and local mandatory access laws. At no point in the long history of these policies has the Commission seen fit to preempt such laws, and has explicitly blessed state and local authority over these matters. In the 2003 Inside Wiring Order, the Commission noted that "States and local jurisdictions are well-positioned to decide whether the need for mandatory access laws outweighs the anti-competitive effects of such laws."[15] That conclusion remains true today. Local governments have been working for decades to address the lack of MTE competition, first in video and telephone service, and now in broadband as consumer demand has shifted to focus on high-speed Internet. As the City and County of San Francisco noted, "[San Francisco] did not

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[12] Boston, Montgomery County, and Anne Arundel County all have some of these census tracts, and their experience with MTEs lacking competitive choice is consistent with national trends.
[13] ILSR/NCC Comments at 2.
[14] *See* Freedman Consulting, LLC, *New Poll: Americans Support Increased Internet Access, Affordability, Competition* (Aug. 2, 2017), *available at* http://tfreedmanconsulting.com.routing.wpmanagedhost.com/wp-content/uploads/2017/08/Polling_Access-Memo_Final_20170802.pdf
[15] *See* 2003 Inside Wiring Order.

break new ground by requiring property owners to allow new communications providers to obtain access to their properties to provide services to occupants."[16] Mandatory access statutes date back decades. Today, nineteen states and the District of Columbia, in addition to a number of local governments,[17] have enacted a variety of mandatory access laws to promote MTE competition since the 1980s.[18] Throughout its long history of examining anticompetitive practices in MTEs, the Commission "has never found that federal law preempts these mandatory access provisions."[19] The Commission declined to preempt these statues in 1997, 2003, and 2007, noting the important role states and localities play in addressing this aspect of competitive deployment and marketplace development.[20]

Against this backdrop of unwavering respect for state and local efforts to promote competition in MTEs, the Commission has "adopted several orders that reduce commercial barriers to entry, including banning exclusive service arrangements in residential MDUs, and increasing access to and use of inside wiring."[21] As the Commission noted in the NOI, the 2000 and 2008 Competitive Networks Orders addressed a bevy of anticompetitive practices pursued by telecommunications carriers to suppress competition in MTEs, seeking to promote competition and consumer choice while limiting incumbent abuses.[22] At no point over the 20-year history of Commission action on these issues has the Commission found cause to preempt any state or local law, despite requests from incumbent providers.[23] To the contrary, the common

[16] City and County of San Francisco Comments at p. 6 (Jul. 24, 2017). ("San Francisco")
[17] *See, e.g.* Tampa, FL Code of Ordinances, Ch 7, Art 1, § 7-14 (2015); Chicago, IL Municipal Code § 4-280-480 (2015).
[18] San Francisco at p. 7.
[19] *Id.*
[20] *See, e.g.*, 1997 Inside Wiring Order; 2003 Inside Wiring Order; 2007 Exclusivity Order.
[21] INCOMPAS Comments at p. 4, FN 8 (Jul. 25, 2017).
[22] NOI at ¶ 3.
[23] *See* 2003 Inside Wiring Order at pp. 1358-59, ¶¶ 37, 39.

thread in the factual records developed by the Commission over the past several decades has been a pattern of behavior on the part of incumbent providers and some property owners to consistently take every opportunity to inhibit and otherwise curtail competition in MTEs.

B. Local Governments Promote Increased Competition And Broadband Choice, Not *De Facto* Monopolies

Coalition members agree with the Commission that "High-speed Internet access is an increasingly important gateway to jobs, health care, education, and information, allowing innovators and entrepreneurs to create businesses and revolutionize local industries."[24] Local governments have a keen interest in ensuring that these very benefits are realized for all their citizens. Local governments nationwide expend substantial resources promoting broadband deployment and Internet access, whether through support for anchor institutions, ordinances designed to incentivize new deployment, or other efforts. In early August 2017, for example, seventeen Mayors from across Missouri gathered to discuss closing the digital divide in their communities.[25] Regarding the significance of broadband access, Kansas City, Missouri Mayor Sly James said: "This infrastructure is as important as concrete, mortar and sidewalks and curbs. This is how information is disseminated. This is how services are acquired. The things we need to do aren't political. They're practical."[26]

Local leaders nationwide are acutely aware of the desperate need for connectivity and the struggles their communities will face without reliable access.[27] Communities across the country,

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[24] NOI at ¶ 1.
[25] Bill Lucia, *Missouri Mayors Look to Expand High-Speed Internet Access*, Route Fifty (Aug. 13, 2017), http://www.routefifty.com/smart-cities/2017/08/kansas-city-mayor-sly-james-high-speed-internet/140201/.
[26] *Id.*
[27] *See, e.g.*, *Ex Parte* Letter from Eleven Ohio Counties and Public Knowledge, GN Docket No. 13-5 (Jul. 20, 2017); *Ex Parte* Letter from Seven West Virginia Counties and Public Knowledge, GN Docket No. 13-5 (Jul. 20, 2017) (demonstrating widespread awareness among local

faced with a lack of service from dominant providers, have tackled the problem head-on in a variety of ways. Faced with inadequate service from incumbent providers who faced no competition, some communities have adopted policies to ease the entry of new competitors.[28] Other cities have opened up their own publicly-owned municipal networks to provide critical middle-mile infrastructure, lowering the up-front expenditure requirements for providers willing to enter the market and meet the community's needs. Still, others have worked either independently, through utility co-ops, or through other public-private partnerships to directly ensure the provision of retail broadband services. At every turn, these efforts have been opposed by some of the same incumbent broadband providers who seek here to prevent local governments from acting to promote competition in MTEs.[29]

Some 30% of US residents live in MTEs.[30] MTEs by their very nature provide a uniquely concentrated opportunity to promote broadband deployment and choice in a relatively efficient manner. Tenant density in MTEs ensures that actions bringing competition to one consumer in fact benefit anywhere from a handful, to many hundreds, of tenants. The Commission has recognized, too, that "[t]he percentage of minorities living in [residential MTEs] is larger than

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government officials of the critical importance of broadband for economic and social development).

[28] *See, e.g.*, Jacob Ryan, *Louisville Metro Council OKs 'Google Fiber Ordinance'*, WFPL (Feb. 11, 2016) ("An ordinance meant to streamline the process for bringing ultra-fast Internet service to Louisville won easy approval Thursday from the Metro Council."), http://wfpl.org/louisville-metro-council-oks-google-fiber-ordinance/.

[29] *See, e.g. Petition of the Multifamily Broadband Council (MBC) Seeking Preemption of Article 52 of the San Francisco Police Code*, MB Docket No. 17-91 (Feb. 24, 2017).

[30] *See* Table from the U.S. Census Bureau's 2010-2014 American Community Survey 5-Year Estimates, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B25024&prodType-table ("American Community Survey") (showing that thirty percent of American homes are in multifamily buildings).

that of the general population."[31] Therefore, when local government promotes competition in MTEs, it is also ensuring that residents in these particularly underserved communities have access to competitive broadband options. Cities and counties have therefore prioritized promoting MTE competition as a highly efficient area of focus, with the potential to create substantial benefits. While some cities, such as San Francisco, have adopted direct approaches, using their capacity to regulate property owners within their jurisdiction, other cities have sought to incentivize property owners to recognize and accept the benefits of competition.

The City of Boston, for example, has recently announced that the Boston Planning & Development Agency ("BPDA") and the City of Boston's Department of Innovation and Technology will work with WiredScore to incorporate broadband competition as an element of the BPDA's review process for new projects, planned development areas, and institutional master plans.[32] WiredScore administers the world's first and only international rating system for commercial real estate, Wired Certification, to help tenants find best-in-class connected buildings while empowering landlords to compete and promote their buildings' infrastructure and connectivity to existing and potential tenants. By including the questionnaire in Article 80 filings, the BPDA will not require that developers pursue Wired Certification. If developers determine that they would like to pursue Wired Certification for their building, the developer will enter into a relationship with WiredScore that is separate and apart from the City's integration of the themes of Wired Certification into the broadband questions posed in the Article 80 Design Review process. At this time, the questions will not be used as a regulatory tool.[33]

[31] 2007 Exclusivity Order at ¶ 8.
[32] *In re Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code*, DA 17-318, MB Docket No. 17-91, Reply Comments of the City of Boston, Massachusetts at p. 9 (Jun. 9, 2017).
[33] *See Id.* at p. 11 (Jun. 9, 2017).

Montgomery County, Maryland has worked with broadband service providers to expand deployment of competitive broadband services and business awareness of the fifteen wireline broadband service providers within the County. County Executive Isiah Leggett created the ultraMontgomery in December 2014 to have a program specifically dedicated to expanding access to ultra high-speed broadband services. As part of this program, a Broadband Market Report was created by convening broadband service providers, commercial building stakeholders, and businesses, to identify actions the County could take to improve broadband access. An interactive map has been created in beta form using information provided by broadband service providers, to map where fiber is deployed and broadband-ready buildings with high speed Metro Ethernet connections. The County is also working with private developers to deploy high-density polyethylene micro conduit and fiber in new construction areas – both along new rights-of-way and from the street into buildings – to allow new commercial and MTE tenants to have immediate and cost-effective access to competitive broadband services. And Montgomery County will be hosting a Gigabit Summit in Spring 2018 to bring together architects, building engineers, urban planners, and broadband service providers, to discuss collaborative strategies and actions to improve access to broadband service in MTE buildings.[34]

C. Interference With Local Authority Will Backfire, Undermining Commission and Local Efforts To Promote Broadband Deployment And Consumer Choice

The Commission has a crucial role to play in promoting broadband deployment and closing the digital divide, but it cannot tackle the challenges inherent in promoting competitive, advanced telecommunications capability nationwide singlehandedly. Many of the challenges, and therefore solutions, inherent in closing the digital divide, connecting consumers, and

[34] More information about the ultraMontgomery efforts may be found at https://www.montgomerycountymd.gov/ep/ultramc.html (Last visited August 22, 2017).

promoting competition are fundamentally local concerns. They are not best addressed by one-size-fits-all nationwide policy. As the Institute for Local Self-Reliance and Next Century Cities noted, "[w]hile federal and state laws have the potential to help cities and counties, local communities are best at determining their needs."[35]

As Seattle noted, "localities, in fact, share the stated goal of the FCC to improve competitive broadband access to MTEs."[36] Federal policy will certainly play a crucial role in advancing the deployment of broadband nationwide, but Commission action is not a cure-all, and is not appropriate or permissible in all situations. Local governments are playing their part on an ongoing basis to promote all types of broadband deployment. Commission actions to homogenize policy over fundamentally local matters, even if it were legally permissible, would undermine a variety of ongoing local efforts to promote competition and close the digital divide. As the Institute for Local Self-Reliance and Next Century Cities noted, "decision makers at the federal or state local are too far removed from a local community's experiences with large or small ISPs, MTE building owners and landlords, or local politics" to effectively address the unique challenges faced by each community across the country.[37]

Local governments must have the legal authority and ability to act to solve problems they themselves identify. The Commission must not tie local governments' hands and force them to sit idly by while solvable problems go unaddressed.

[35] ILSR/NCC at p. 5.
[36] Seattle Comments at p. 2 (Jul. 25, 2017).
[37] ILSR/NCC at p. 5.

III. THE RECORD IS VOID OF LOCAL GOVERNMENT HARMS, BUT COMPELS CONTINUED COMMISSION FOCUS ON THE SERVICE PROVIDER-PROPERTY OWNER RELATIONSHIP

A. Commission Efforts Have and Should Continue to Focus on Established Service Providers, Not Local Governments, as the Source of Anticompetitive Harms.

The Commission should continue its long-established practice of focusing its efforts at promoting MTE competition toward those entities which benefit from the lack of competitive choice experienced by many MTE residents nationwide. As discussed above, local governments have no incentive or desire, nor any documented history, of inhibiting broadband deployment. On the contrary, localities nationwide continue to work proactively to address the problem of competitive choice in MTEs. In addition to decades-old mandatory access laws, cities like Boston and Portland, and counties such as Anne Arundel and Montgomery County, Maryland, work on an ongoing basis to implement policies and local ordinances designed to close the digital divide and lower broadband costs for consumers by promoting competitive entry in MTEs. To the extent the Commission seeks to revisit problems in MTEs, it should direct its attention to the ongoing behavior of incumbent providers and property owners. Those problems are clearly identified by competitive broadband providers at numerous points in the record.[38] Local government actions are attacked only by providers that seek to preserve *de facto* monopoly status in MTEs.[39]

B. The Record Demonstrates that Landlords and Incumbent Providers, not Local Governments, Are the Source of Competitive Harm and Limited Choice.

There is not a single instance in the record of a local government policy inhibiting the deployment of broadband to an MTE. While some commenters raise concerns that mandatory

[38] *See, e.g.*, Starry Comments (Jul. 24, 2017); FastMesh Comments (Jun. 16, 2017).
[39] *See, e.g.*, National Multifamily Housing Council Comments (Jul. 24, 2017) ("NMHC"); NCTA Comments (Jul. 24, 2017).

access laws or other local government actions to promote MTE competition might lead to future harms, these allegations are not at any point substantiated with particular examples of actual prohibitions on deployment. Provider and property owner objections are perhaps best characterized as speculative, rather than factual. Moreover, the complaint is simply that a *de facto* monopoly status has been defeated.

State and local laws to promote deployment in MTEs are hardly new. If any of the harms alleged were actually going to occur, they surely would have happened over the past several decades and the record would have contained evidence of such harms. It does not. The record also reveals that there is not a single example of an MTE project being developed *without* broadband connectivity at all, let alone developed without broadband as a result of local policies regarding MTE competition and consumer choice. Surely commenters who allege harm from state and local government policy, such as NCTA, would have cited any example of the harms they discuss, had there in fact been any such example.[40] Their silence on this point speaks volumes.

Even as some parties attack local policies aimed at placing broadband competition & choice where it belongs – in the hands of consumers, not providers or property owners – commenters in this proceeding go to great lengths to defend and justify their own anticompetitive practices.[41] Providers and property owners cite, for example, their ability to bring broadband to low and mixed-income communities, not just the "most lucrative" communities.[42] Camden Property Trust argues that mandatory access laws threaten to "undermine financial commitments tied to bulk billing arrangements that independent services providers rely upon to finance the

[40] See NCTA Comments.
[41] Apartment Companies Letter at p. 2 (Jul. 25, 2017).
[42] *Id.*

delivery of services to otherwise unserved or underserved low income MDUs."[43] First, mandatory access laws do not prohibit bulk billing. Second, this attitude suggests that *de facto* exclusive wiring arrangements and a lack of consumer choice are some sort of 'the price you pay' to get broadband deployed to low-income communities. Coalition members believe that competition, choice, and the benefits of broadband are essential for all communities, regardless of their socio-economic status. Low-income communities are just as deserving of competitive choice as the "most lucrative" communities, and furthermore, are often in greater need of the downward pressure on consumer prices that is exerted by the presence of competitive providers in a marketplace. While practices like bulk billing and limiting consumer choice may make it more convenient for large property owners and ISPs to serve communities they might not otherwise consider profitable enough to serve, Camden offers no evidence that bulk billing is prohibited or that competition and consumer choice are inconsistent with closing the digital divide. Coalition members strongly disagree with any assertion in the record that competitive market entry and the benefits of consumer choice must be sacrificed in favor of single-provider monopolies, as though there were no other means by which the digital divide might be addressed.

It is telling, and should weigh heavily on the Commission's consideration of this record, that the only defenses of wiring exclusivity come from large property owners well-positioned to benefit financially from these and other arrangements, or from ISPs already entrenched in these markets, whose business models and financing, they claim, depend on guaranteed revenues that can only be assured through practices which have negative effects on competition and consumer choice. The National Multifamily Housing Council, for example, argues that small ISPs "rely on

[43] Camden Property Trust Comments at p. 7 (Jul. 25, 2017).

the certainty of knowing that they will have a guaranteed subscriber base to support the financial justification to . . . make the investment to build out and maintain facilities in a MTE."[44] Put another way, NMHC argues, ISPs can't justify meeting higher-than-ever consumer demand for broadband, unless they can count on freedom from competition. While this is perhaps an understandable business case, at least from the perspective of an incumbent provider faced with the daunting prospect of suddenly having to compete on price, service, or other aspects of its offering, guaranteeing monopolies for the convenience of providers is fundamentally at odds with the underlying purpose of the Telecommunications Act of 1996 and the Federal Communications Commission itself.[45]

Furthermore, the record suggests that these assertions from property owners and some established ISPs are themselves questionable. Truly competitive providers, such as Starry, appear able to compete handily in the market without engaging in anticompetitive practices or seeking guaranteed revenues to justify investment.[46] Starry describes the "challenges and opportunities presented by a marketplace that has long been dominated by one incumbent provider" this way: as "more competitive services enter the market, incumbents have become more sophisticated and aggressive at protecting their monopoly positions within MDUs to ward off competition, to the detriment of consumers."[47]

The City of Seattle highlights, for example, the submission of FastMesh, a small ISP which documents significant challenges in building "a network that can provide affordable internet to all locations we service. "[48] FastMesh plans range from $15-35/month, well below the

[44] NMHC at p. 5.
[45] 47 USC §§ 151, 1302.
[46] Starry at pp. 3-4.
[47] *Id.*
[48] FastMesh at p. 1.

average rates charged by large ISPs, even after bulk billing discounts might be taken into account.[49] FastMesh chronicles an array of service provider and property owner practices which have inhibited FastMesh's growth. At no point does FastMesh, or any other competitive ISP seeking entry to MTEs to compete with incumbents, detail a need for exclusivity to guarantee revenues or justify its investment.[50] In fact, FastMesh argues, service provider and property owner conduct has been so harmful that "these challenges have limited our ability provide service to more areas." "[O]ver the past 8 years, had we had better regulation, some kind of enforcement of them, and clear communication of them to MDU owners, we would be in an additional 100 properties, have a more robust network, and have a larger team of employees to develop our network and technology."[51]

Moreover, in Montgomery County, Maryland, competitive broadband providers have asked the County to assist in improving building access issues with building owners. For example, local telecommunications provider and data center operator Atlantech Online, Inc. requested that the County require installation of conduit from the street to buildings because of the difficulty of obtaining access to the buildings:

> The real hurdle to lighting most office buildings with fiber is the landlord. Our couple of decades of experience in dealing with landlords has shown that if there is not something directly in this for the owner of the building, they are not interested in cooperating with carriers. Landlords have demonstrated time and again that they care little about their office tenants' interest in competitive broadband solutions. We spend an inordinate amount of time negotiating and working on behalf of their tenants to persuade them to allow us to light office buildings.

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[49] See Carl Weinschenk, *Report: U.S. Median Broadband Price is $80 Monthly*, TeleCompetitor (Aug. 8, 2017), http://www.telecompetitor.com/report-u-s-median-broadband-price-is-80-monthly/.
[50] FastMesh at p. 1; *see also* Starry.
[51] FastMesh at p. 1.

> … Atlantech highly recommends that … new and renovated buildings to have two separate and divergent conduit fiber entrances (2 x 4" conduits with 4 inner ducts inside each conduit) at the property line adjacent to the private road. …The cost to commercial building developers is negligible when these conduits are part of the base construction – having carriers jack hammer and bore under roads, sidewalks and parking lots after construction is complete is a financial barrier to delivering broadband. [52]

In addition, the County's third competitive cable operator Starpower/RCN, has previously asked to the County to assist in getting MTE access to cable television and cable modem broadband services, and note that the problem can also lack of coordination between the building owner and building management company. As one example, Starpower stated that after 6-9 months of conversation with a building management company (with whom Starpower has a relationship in neighboring state), Starpower has "provided them with documentation to allow us access, but they have not been able to get the agreement from the building ownership to allow us in the buildings."[53]

The Commission itself has, as INCOMPAS notes, also recognized the lack of credence in arguments that exclusivity is necessary to spur investment.[54] INCOMPAS correctly highlights the Commission's 2007 finding that "there is no evidence in the record, other than generalities and anecdotes, that incumbent MVPD providers couple exclusivity clauses with significant new investments . . . ."[55] It remains as true today as it was in 2007 that "there is simply no evidence that exclusive rights – whether to access a building's residents, or to the wiring in a building –

[52] Email from Ed Fineran, President, Atlantech Online, Inc., to Montgomery County Council President and Planning, Housing and Economic (PHED) Council Committee Chair Nancy Floreen (July 1, 2016).
[53] Email from Jamie Hill, General Manager, Starpower Communications, to Marjorie Williams, County Franchise Manager (October 3, 2011).
[54] INCOMPAS Comments at pp. 15-16 (Jul. 25, 2017).
[55] 2007 Exclusivity Order at ¶ 28.

has any relationship to a provider's willingness to install, upgrade, or maintain facilities."[56] Simply put, those commenters in the record who build their businesses on providing competitive choice to consumers do not cite a need for revenue guarantees to support deployment, while entrenched incumbents who have built a business dependent on a lack of competition, argue the opposite. If the Commission's interest truly lies with promoting competition, it will pay particular heed to the local governments and competitive providers documenting their efforts, and describing what would really help close the digital divide, rather than focusing on the needs of already-established incumbents of various sizes who are committed to protecting their exclusivity.

IV. EXERCISE OF SECTION 253 AUTHORITY IS NOT APPROPRIATE, PERMISSIBLE, OR JUSTIFIED

A. Section 253 Provides Limited and Specific Preemption Authority, Not a General Grant.

The focus of Section 253 is narrow: it seeks to preempt state and local regulatory systems that grant or have the effect of granting telephone monopolies:

> Congress apparently feared that some states and municipalities might prefer to maintain monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. Section 253(a) takes that choice away from them, thus preventing state and local governments from standing in the way of Congress' free market vision.[57]

Section 253 is designed to "end[ ] the States' longstanding practice of granting and maintaining local exchange monopolies" and is concerned with limiting local government actions that keep entities out of the market.[58] Section 253 does not grant the Commission the authority to address perceived deficiencies or irregularities in regulation at the state or local

[56] INCOMPAS at p. 16.
[57] *Cablevision, Inc. v. Pub. Improvement Comm'n,* 184 F.3d 88. 97-98 (1st Cir. 1999).
[58] *AT&T v Iowa Utilities Board,* 525 U.S. 366, 405 (1999) (Thomas, J. concurrence).

level, or to preempt laws which the Commission judges serve as mere barriers to entry – a much lower standard than that prescribed by statute. Under Section 253, the only measure of preemption is whether the requirement has the particular effect of "impair the ability to provide service."[59] In the instant matter, the Commission is examining state and local laws that create the ability provide service for some at the expense of *de facto* monopolies enjoyed by others.

B. Section 253 Does Not Permit the Commission to Engage in Rulemaking-Based Preemption

The Commission has asked elsewhere whether Section 253(d) is a "non-mandatory procedural vehicle."[60] This process is mandatory. At the time of that inquiry, the Commission simultaneously recognized that Section 253(d) "directs the Commission to preempt the enforcement of particular State or local statutes, regulations, or legal requirements 'to the extent necessary to correct such violation or inconsistency'" and only to act "to preempt such particular requirements 'after notice and an opportunity for public comment.'"[61] Thus, Section 253(d) plainly requires individualized notice and opportunity for comment on particular statutes, regulations, or legal requirements, before the Commission may find, based on that record, that there may be a violation. Furthermore, only *then* can the Commission preempt *only to the extent necessary* to correct the violation. Broad ranging rules of general applicability would not meet this standard.

Section 253(d) specifically envisions case-by-case determinations to support preemption. In 1997, the Commission explicitly rejected the assertion that preemption under Section 253 may be conducted through a rulemaking deeming certain practices *per se* preempted, correctly ruling

[59] *Id.* at 389.
[60] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment (rel. Apr. 21, 2017) at ¶110.
[61] *Id.*

that the statute requires a factual showing:

> We cannot agree that the City's exercise of its contracting authority as a location provider constitutes, *per se*, a situation proscribed by section 253(a). The City's contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. In other words, the City's contracting conduct would have to *actually prohibit or effectively prohibit* the ability of a payphone service provider to provide service outdoors on the public rights-of-way in the Central Business District. As described above, the present record does not permit us to conclude that the City's contracting conduct has caused such results. If we are presented in the future with additional record evidence indicating that the City may be exercising its contracting authority in a manner that arguably 'prohibits or has the effect of prohibiting' the ability of payphone service providers other than Pacific Bell to install payphones outdoors on the public rights-of-way in the Central Business District, we will revisit the issue at that time.[62]

The Commission later reinforced the point:

> With respect to a particular ordinance or other legal requirement, it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement such as the Troy Telecommunications Ordinance must supply us with *credible and probative evidence* that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).[63]

The procedure laid out in Section 253(d) is not optional, and the Commission cannot preempt by the imposition of general rules.

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[62] *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14191, 14209 at ¶ 38 (rel. July 17, 1997) (emphasis added).

[63] *In the Matter of TCI Cablevision of Oakland County, Inc.*, FCC 97-331, 12 FCC Rcd. 21,396, 21440 at ¶101 (rel. Sept. 19, 1997) (emphasis added).

C. The Commission Cannot Use Section 253 To Preempt State and Local Laws Affecting Property Owners As Property Owners.

In its opening comments, the City of San Francisco correctly noted that "mandatory access statutes regulate property owners, not telecommunications providers; the Commission has no authority under Section 253(a) to preempt those laws."[64] Just as the Commission cannot use Section 253 to address the policies and actions of state and local governments acting in their proprietary capacity as custodians of public property and facilities, it cannot interfere with state and local police powers, or with the efforts of state and local governments to ensure that property owners do not limit consumer choice and inhibit broadband competition. While the Commission shares the goal of state and local governments in promoting the deployment of competitive broadband choices for all Americans, regardless of where they live, the tools available to each entity are distinct. Just as local governments cannot dictate wireless spectrum policy, the Commission quite simply cannot dictate local government policy governing property owners.

D. The Record Before the Commission Does Not Support the Exercise of Section 253 Authority.

Even if the Commission had any authority to act to preempt state and local mandatory access laws, or wished to abandon more than three decades of Commission precedent and respect for the fact that "[s]tates and local jurisdictions are well-positioned to decide whether the need for mandatory access laws outweighs the anti-competitive effects of such laws,"[65] the record developed in this proceeding would not support any preemptive action. Commenters opposing state and local mandatory access laws and seeking Commission preemption fail to articulate or substantiate any clear example of broadband deployment that would have taken place but for a

[64] San Francisco at p. 11; *see also In re Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code*, DA 17-318, MB Docket No. 17-91, Reply Comments of the City of Boston, Massachusetts at p. 9 (Jun. 9, 2017).
[65] 2003 Inside Wiring Order at ¶ 39.

state or local mandatory access law. The record does not reflect even a single argument that any alleged harm approaches the level of a broadband prohibition. In fact, some commenters who support preemptive action argue for purely speculative harms. NCTA, for example, describes the harms justifying preemption in purely speculative terms, stating that state and local laws which "interfere with contractual arrangements between broadband providers and private MTE building owners . . . would conflict with explicit federal objectives" and harm the deployment of broadband.[66]

Were NCTA's fearmongering true, its own members would not exist today. The past four decades of mandatory access policies would certainly have clearly shown any prohibitive effect in real terms, manifested in a failure of the cable industry to get off the ground in MTE spaces. The very growth and success of NCTA's membership, which includes the two largest ISPs in the country, is a testament to the importance and success of state and local policies promoting and guaranteeing competitive access. Finally, NCTA makes no effort to articulate any facts, evidence, or other basis upon which the Commission might conclude that these policies meet Section 253's requirement of effective prohibition.

The record, as a whole, reflects a similar trend. Where commenters seek or endorse preemption, there is no articulation of any evidence to permit the Commission to even begin making the factual findings necessary to support Section 253 preemption, nor argue that the mandatory procedural requirements of Section 253(d) have been met. Faced with a record so clearly devoid of factual evidence or particularized submissions supporting broad demands for preemption, the Commission is left with no choice but to conclude that state and local government policies do not prohibit, nor have the effect of prohibiting, broadband deployment.

[66] NCTA Comments at p. 11 (Jul. 7, 2017) .

Accordingly, and in keeping with decades of Commission precedent, no preemption of state or local authority in this area is appropriate.

E. The Commission Cannot Exercise Title II Authority to Preempt Local Governments and Promote Broadband Deployment If It Reclassifies Broadband Internet Access Service as a Non-Title-II Service.

The Commission in this proceeding seeks input on preempting state and local laws, using Section 253.[67] Coalition members would remind the Commission that, should it seek to rely upon that authority, it can only use that authority if broadband Internet access service ("BIAS") remains classified as a telecommunications service. Elsewhere, the Commission proposes to abandon that classification, in favor of information service classification.[68] These proposals are inherently contradictory, however. The Commission may only sustain efforts to use Title II telecommunications-related authority to the extent it continues to treat broadband as a telecommunications service.

Simply put, the Commission loses the ability to exercise Title II powers in furtherance of broadband-related objectives if it continues to pursue its effort to reverse the Title II classification of BIAS. In its *Restoring Internet Freedom* proceeding, the Commission "propose[d] to reinstate the information service classification of broadband Internet access service".[69] The plain language of Section 253 (and other relevant portions of Title II, such as Section 201(b)) are unambiguous: they apply specifically to telecommunications service, not to information services. The DC Circuit has explicitly rejected efforts to circumvent this statutory language, ruling in *Comcast Corp. v. FCC* that the Commission cannot exercise common carrier authority over a non-common-carrier service simply because of potential impact on common

[67] NOI at ¶ 19.
[68] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, ¶ 24 (rel. May 23, 2017).
[69] *Id.* at ¶ 24.

carriers and video programming.[70] The DC Circuit reiterated the limits of the Commission's ancillary authority, quoting *NARUC II*: "[T]he allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority."[71]

V. LOCAL GOVERNMENTS SUPPORT EFFORTS TO DEVELOP RESOURCES TO INFORM LOCAL GOVERNMENTS' POLICYMAKING CHOICES WHILE PRESERVING LOCAL FLEXIBILITY AND AUTHORITY.

The NOI also asks of other actions the Commission might "take to promote competitive entry into MTEs."[72] Members of the Coalition supported the Commission's efforts to ban exclusive contracts in the past, and the Commission's educational efforts to promote enhanced competition in the marketplace for broadband service. Like the Commission, Coalition members have a keen interest in closing the digital divide in order to maximize opportunities for their communities and constituents.

Efforts such as the Commission's Broadband Deployment Advisory Committee ("BDAC") present a unique opportunity for diverse stakeholders to engage productively in search of mutually beneficial solutions to help inform government at all levels in making policy choices which best serve the particular needs of the nation's diverse patchwork of communities. It is critical that a broad array of local voices be included in these efforts, and the Coalition urges the Commission to recognize and take steps to address the substantial imbalance in the makeup of the BDAC and its working groups, which overwhelmingly favors industry voices on all topics.[73] For example, the BDAC's Model Code for Municipalities working group, established to

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[70] *Comcast Corp v. FCC*, 600 F.3d 642, 660 (D.C. Cir. 2010).
[71] *Id.* at 661 (quoting *National Assoc. of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976)).
[72] NOI at ¶ 22.
[73] *See* Membership Lists of BDAC & Working Groups, *available at* https://www.fcc.gov/broadband-deployment-advisory-committee; *see also* Blake Dodge, *FCC*

"draft a model code as a resource for municipalities to accelerate broadband deployment"[74], includes only three local government voices among its 24 members.[75] At least fourteen of the twenty-four members hail from the broadband industry.

It is essential to the success of any advisory body that it meaningfully include the full range of perspectives it purports to address. The Coalition does not believe the BDAC membership, as selected by the Commission, meets that important criteria. Coalition members are, therefore, quite concerned that the BDAC will struggle to speak with authority and legitimacy as to the interests and concerns of state and local governments regarding issues including, but not limited to, broadband deployment, competition, legislative and regulatory approaches, and preemption recommendations. Without a more balanced makeup and more than token efforts to include local government, the BDAC process risks being little more than an industry-driven focus group developing industry wish lists without meaningful consideration of local policy concerns.

Similarly, the Coalition supports the Commission's effort to develop model materials that may inform state and local policymakers as they address broadband policy issues in their communities. The Commission asked in this NOI about preparing model codes.[76] The focus appears, however, to be on building one set of model codes with the intention that those be adopted as widely as possible, for the sake of uniformity. While it is understandable why the

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packs broadband advisory group with big telecom firms, trade groups, The Center for Public Integrity (Aug. 11, 2017), https://www.publicintegrity.org/2017/08/11/21057/fcc-packs-broadband-advisory-group-big-telecom-firms-trade-groups.

[74] Presentation of the BDAC Model Code for Municipalities Working Group, Slide 2 (Jul. 20, 2017) *available at* https://www.fcc.gov/sites/default/files/bdac-07-20-2017-presentation-model-code-for-municipalities.pdf..

[75] FCC Announces The Membership Of Two Broadband Deployment Advisory Committee Working Groups: Model Code For Municipalities And Model Code For State, GN Docket No. 17-83, (May 8, 2017) found at https://apps.fcc.gov/edocs_public/attachmatch/DA-17-433A1.pdf.

[76] NOI at ¶22.

industry-focused majorities of the BDAC and all its working groups would desire national uniformity, it is imperative that the Commission respect decades of its own precedent, discussed above, and recognize that each community has unique needs and challenges, and that one-size-fits-all solutions are simply not appropriate. Accordingly, the Coalition urges the Commission to expand the BDAC's mandate to focus on collecting a diverse array of policy systems which have been demonstrated to achieve positive results in meeting the needs of communities, not just service providers.[77]

Local governments nationwide have pursued a broad array of approaches to expanding broadband deployment and enhancing competition, including but not limited to municipal broadband projects, public-private partnerships, investment-friendly franchising policies, streamlined wireless siting rules, and one-touch-make-ready pole attachment provisions designed to ease competitive entry and accelerate deployment. All of these options, and more, should be presented as part of any BDAC model materials, as the needs of each community are unique and may be better met by some approach other than the condensed, unified approach likely to be promulgated by the industry-dominated BDAC working groups. The Commission appears open to "facilitat[ing] the compilation of best practices regarding competitive entry to MTEs"[78] and should consider a broad effort to provide the full scope of effective practices as part of any materials it develops.

One practice that may be included as a working example is the City of Boston's effort to integrate technical principles regarding broadband-ready building into the development process. In partnership with WiredScore, Boston has developed a Broadband Ready Building

[77] *See* Ex Parte Letter from the National Association of Regulatory Utility Commissioners, GN Docket No. 17-83 (Aug. 21, 2017).
[78] *Id*.

Questionnaire to further the City's goal to cultivate a broadband ecosystem that serves the current and future connectivity needs of residents, businesses, and institutions. Departments across the City are working to streamline and otherwise adapt existing policies and processes to enable private investment in broadband infrastructure, expand competition and choice for residents and businesses, and create an environment that is equipped to support a diverse range of connectivity purposes now and in the future.[79]

Though included in the design review process pursuant to Article 80 of the Boston Code, Wired Certification is not a requirement placed upon developers. While developers are required to complete the questionnaire. It is not used as a regulatory tool. The Questionnaire represents but one part of Boston's range of efforts to promote broadband deployment and competition, and is but one of many approaches that could be included in any Commission-endorsed best practices compendium. It is essential that communities nationwide are presented with more than just one path forward that is favorable to and endorsed by the broadband industry, but instead with a full array of options to ensure that communities may choose the path that is best for their unique situation, and not simply what is best for large broadband providers.

[79] The Broadband Ready Building Questionnaire and other City efforts are discussed in further detail in the City of Boston's Reply Comments in MB Docket No. 17-91 (Jun. 9, 2017).

VI. CONCLUSION

For the foregoing reasons, the Cities of Boston, Massachusetts and Portland, Oregon, joined by Anne Arundel and Montgomery Counties, Maryland urge the Commission to reject calls for preemption of state and local laws that guarantee choice, and instead look to the real threats to competition, consumer choice, and broadband deployment as it continues its laudable efforts to bring the benefits of modern broadband connectivity to all Americans.

Respectfully Submitted,

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